No. 4079

2

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

GETZ BROS. & CO. OF THE ORIENT, LIMITED,

Plaintiff in Error,

vs.

H. M. SHIREK, Doing Business Under the Name and Style of The Merchandise Brokerage Company,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

CHARLES W. SLACK and
EDGAR T. ZOOK,
Attorneys for Plaintiff in Error.

The James H. Barry Co., 1122 Mission Street, San Francisco, California

SUBJECT INDEX

AUTHORITIES CITED

No. 4079

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

GETZ BROS. & CO. OF THE ORIENT, LIMITED,
Plaintiff in Error,
vs.
H. M. SHIREK, Doing Business Under the Name and Style of THE MERCHANDISE BROKERAGE COMPANY,
Defendant in Error.
No. 4079

BRIEF OF PLAINTIFF IN ERROR

Statement of the Case.

Plaintiff in error, the defendant in the lower Court, has sued out this writ of error to the United States Court for China, from the judgment of the latter

Court in an action for damages for breach of an alleged contract in writing for the sale by plaintiff in error to defendant in error, plaintiff below, of 370 tons of mild steel plate cuttings. The alleged contract is set forth at length in the Transcript (pp. 3-10), but the portion thereof material to the consideration of the point to be urged for a reversal of the judgment of the lower Court is contained in the first part thereof, appearing on pages 3 and 4 of the Transcript. This portion of the alleged contract is as follows:

"Contract.

Getz Bros. & Co. of the Orient, Ltd.

Shanghai, February 3d, 1922.

Getz Bros. & Co. of the Orient, Ltd., have sold and Merchandise Brokerage have bought the following described merchandise, *upon the terms and conditions named herein and on the reverse side of this contract.*

All sales are subject to goods being obtainable.

Seller is not responsible for non-delivery by reason of loss of cargo en route, fire or any unavoidable casualties, or for delays beyond their control.

To be insured against war risk at buyer's expense.

Terms—

Shipment: Delivery from Shanghai stock.

Remarks: Complete delivery and full payment to be made on or before February 28th, 1922.

Quantity	Description	Price U. S. Gold
370 Tons (more or less)	covering all Mild Steel Plate Cuttings all sizes and test pieces held in our	

Shanghai Stock covered by Drafts Nos. B. C. 4139, 4137, 4135, 4315, 4323, 2913, 2914, 4362, 4363 and 4373.

Say Three hundred sixty to Three hundred seventy-one Tons at Shanghai Taels 2.75 per picul of 133 1/3.

Receipt of deposit Taels 900.00 is hereby acknowledged and we agree to deliver documents on payment, if cable advice from our Home Office permits sale without suit against original buyers. Reply should be receive approximate seven (7) days when written confirmation will be made. Approved by seller.

Getz Bros. & Co. of the Orient, Ltd.
(Signed) By T. L. Parkhurst,
Manager."

(Italics ours.)

The remaining portion of the alleged contract is headed "Conditions," and will be incidentally referred to hereafter.

This instrument having been signed and delivered, defendant in error, on February 3, 1922, made the deposit of 900 taels referred to therein (Tr., p. 18), and nothing further was done with reference to the matter until about the 12th or 13th of February, when Mr. Parkhurst, the manager of the Shanghai office of plaintiff in error, stated to defendant in error that he had received a cable from his home office which advised him to proceed legally against the original purchasers of the cargo (Tr., p. 19). On February 14, plaintiff in error wrote defendant in error the fol-

lowing letter (Plaintiff's Exhibit "D," Tr., pp. 42-43):

"Getz Bros. & Co. of the Orient, Ltd.
Incorporated.
Exporters and Importers.

Whiteaway, Laidlaw Bldg.,
Nanking Road, Cor. Szechuen.
Shanghai, China, February 14th, 1922.

The Merchandise Brokerage Co.,
No. 7 Ezra Road, Shanghai.
Attention: Mr. H. M. Shirek.

CONTRACT FOR PLATE CUTTINGS

Dear Sirs:

In compliance with our memorandum with you, we cabled to our Home Office on February 3d, as follows:

'Re Plate Cuttings stock—we understand legally must sue buyers before selling.'

We have now received a reply from our Home Office dated February 7th, 1922, in which they refer to our message and advise us to take legal proceedings.

Under these circumstances, the cargo has been turned over to our Compradore, who we will hold for decision of arbitration as to the reliability *(sic)* of the original purchaser.

We regret that we cannot carry out our contract with you and are returning attached our check No. 705 for Taels 900.00 (nine Hundred) to cover the deposit which you made with us.

Thanking you for the offer, we beg to remain,

Yours very truly,
Getz Bros. & Co. of the Orient, Ltd.,
By T. L. Parkhurst,
Manager.

TLP/RA
Enclos: cheque."

The letter just quoted was the only writing referring to the alleged contract received by defendant in error from plaintiff in error after the delivery of the alleged contract of February 3 (Tr., p. 23), other than the check for 900 taels, which defendant in error received with the letter and cashed (Tr., p. 24).

After the receipt of this letter, defendant in error, through his attorneys, demanded of plaintiff in error the delivery of the 370 tons of plate cuttings (Plaintiff's Exhibit "B," Tr., p. 40), and plaintiff in error made an offer to let defendant in error have 50 tons of cuttings (Plaintiff's Exhibit "A," Tr., pp. 39, 40). This offer was declined (Plaintiff's Exhibit "C," Tr., p. 41), and suit was thereupon instituted. Plaintiff in error's demurrer having been overruled, issue was joined, and on the trial of the case judgment was rendered in favor of defendant in error for 6000 taels, and interest (Tr., p. 57).

Specification of Errors Relied Upon by Plaintiff in Error.

Plaintiff in error relies upon one fundamental error of the lower Court, namely, that the Court erroneously construed the instrument, dated February 3, 1922, upon which the suit was brought, as a completed contract of purchase and sale, whereas the instrument shows on its face that it was nothing more than a tentative offer, subject to written confirmation to be later given or withheld at the option of plaintiff in error, after

communication between its Shanghai office and its home office. This error of the Court necessarily involves the overruling of the demurrer (Assignments of Error Nos. 1, 2, 3 and 4, Tr., pp. 61-63), the denial of the motion to dismiss notwithstanding the evidence (Assignments of Error Nos. 5, 8, 9 and 10, Tr., pp. 63, 64), and the rendition of judgment in favor of defendant in error (Assignments of Error Nos. 11, 12, 13, 14, 15 and 16, Tr., pp. 64-68, and No. 29, Tr., p. 71).

Argument.

As stated in the foregoing specifications of error, the sole point presented for the consideration of this Court is the proper construction of the instrument dated February 3, 1922, and the judgment of the lower Court must stand or fall on such construction. In order properly to construe this instrument, it is necessary to analyze it at some length.

An Analysis of the Alleged Contract Shows That the Instrument Was Obviously Partly Printed and Partly Filled In In Writing or Typewriting.

Upon an examination of the terms of the instrument sued on (Tr., pp. 3, *et seq.*), it is at once apparent that it is full of inconsistencies. It is perhaps unfortunate that the original instrument, itself, was not introduced upon the trial, for, by its production, we would have direct proof of what, in the present state of the record, we can only demonstrate by inference, namely, that *in the preparation of the insrtument a printed stock form was used and the particulars applying to the transaction in question were filled in in typewriting or other writing. The very inconsistencies in the agreement demonstrate this fact.*

The first sentence of the instrument reads as follows (Tr., p. 3):

> "Getz Bros. & Co. of the Orient, Ltd., have sold and Merchandise Brokerage have bought the following described merchandise, upon the terms

and conditions as named herein, and *on the reverse side of this contract.*" (Italics ours.)

The instrument as printed in the Transcript occupies over seven pages thereof, and, if it were written or typewritten, it would undoubtedly occupy as many or more pages of ordinary size, yet it is apparent from the italicized clause above quoted that the form of the instrument was such that the "terms and conditions" thereof were set forth on two pages, the one on which the clause referred to appears and the "reverse side" thereof.

The next three sentences are as follows (Tr., p. 3):

> *"All sales are subject to goods being obtainable.*
> "Seller is not responsible for *non-delivery by reason of loss of cargo en route,* fire or any unavoidable casualties, or for delays beyond their control.
> *To be insured against war risk* at buyer's expense." (Italics ours.)

Under the heading of "terms," we find the following (Tr., p. 3):

> "Shipment, Delivery from Shanghai stock."

The evidence, as well as the clause last quoted, shows that the goods were in Shanghai, and that plaintiff in error had inspected them (Tr., pp. 24, 25), yet the instrument provides against the goods being unobtainable and against non-delivery by reason of loss of cargo en route, conditions clearly inapplicable

to the plate cuttings in question, and for insurance against war risk, when there was no war affecting the Orient in February of 1922.

The next portion of the instrument is as follows (Tr., p. 3):

"Quantity Description *Price U. S. Gold*

370 Tons (more or less) covering all Mild Steel Plate Cuttings all sizes and test pieces held in our Shanghai Stock covered by Drafts Nos. B. C. 4139, 4137, 4135, 4315, 4323, 2913, 2914, 4362, 4363 and 4373.

Say Three hundred sixty to Three hundred seventy-one tons *at Shanghai Taels 2.75* per picul of 133 1/3.

Receipt of Deposit Taels 900.00 is hereby acknowledged and we agree to deliver documents on payment, if cable advice from our Home Office permits sale without suit against original buyers. Reply should be receive approximate seven (7) days when written confirmation will be made.

Approved by seller,
Getz Bros. & Co. of the Orient, Ltd.
(Signed) By T. L. Parkhurst,
Manager."

(Italics ours.)

As the price was fixed at "Shanghai taels 2.75 per picul of 133 1/3," it is manifest that the words "Quantity Description Price U. S. Gold" were already in the form used when the rest of the matter above quoted was inserted therein. It seems clear that all of this matter, excepting, possibly, the words "Approved by seller, Getz Bros. & Co. of the Orient,

Ltd. By," was inserted in a blank space ordinarily filled by data as to a number of items, listed under the several columns "Quantity," "Description" and "Price U. S. Gold."

The remainder of the instrument, beginning with the words "Conditions" (Tr., p. 4), must certainly have been a printed or stock form, for nearly every paragraph thereof contains provisions in no way pertinent to the transaction in question, namely, the sale of goods from the Shanghai stock of plaintiff in error. For instance, provision is made for insurance of the goods while *"in the godowns of the steamship company bringing the cargo to Shanghai,"* for insurance "against war risk," for payment of "duties and importation charges," for contingencies whereby "the manufacture, supply, shipment, transit or delivery of the goods is prevented or delayed" (Tr., p. 5), for contingencies such as "the commandeering of Cargo, Railways, Steamships," "the taking over of a large portion of the output of a mill," charges "caused by Government Embargo"; and reference is made to "mill delays," and shipment "either via Pacific Coast or Atlantic Coast" (Tr., p. 6).

It seems unnecessary to quote further from these conditions, which show conclusively that the instrument was prepared on a stock form, prepared during war times, when embargoes and the commandeering of steamships and of the output of mills were contingencies to be guarded against, and war risk insurance

was almost universally taken out on overseas shipments. And it is no guess, but practically a certainty, that the only space in this two-page form in which the conditions and terms constituting the meat of the instrument could be inserted, was under the heading "Quantity Description Price U. S. Gold."

The First Sentence of the Instrument Was Printed.

This sentence reads as follows:

> "Getz Bros. & Co. of the Orient, Ltd., have sold and Merchandise Brokerage have bought the following described merchandise, upon the terms and conditions as named herein, and on the reverse side of this contract."

Had this sentence not been part of a stock form (with the exception of the words "Merchandise Brokerage"), it is obvious that the instrument would have been drafted somewhat as follows:

"Getz Bros. & Co. of the Orient, Ltd., have sold and Merchandise Brokerage have bought 370 Tons (more or less)," etc. (describing the merchandise which actually was described half a page farther on), "upon the following terms and conditions," etc.

When the form was adopted, it was intended for general use, hence the words "the following described merchandise" were employed, the space for the description being left below the words "Quantity Description Price U. S. Gold."

The Clauses Which Negative An Actual Contract Were Filled In.

These clauses read as follows:

> "Receipt of deposit Taels 900.00 is hereby acknowledged and we agree to deliver documents on payment, if cable advice from our Home Office permits sale without suit against original buyers. Reply should be receive (d) approximate (ly) seven (7) days when written confirmation will be made."

The very informality of the clauses last quoted, as distinguished from the careful wording of the "conditions" appearing thereafter, clearly shows a different hand in their phrasing. "Receipt of deposit Taels 900.00" instead of "Receipt of a deposit of 900.00 Taels," and "Reply should be receive(d) approximate(ly) seven (7) days," instead of "Reply should be received in approximately seven (7) days," indicate the hand of a salesman interested in substance only, instead of the work of a careful scrivener mindful of form.

The Reason Advanced by the Lower Court for Its Decision.

The lower Court, in its opinion (Tr., p. 48 *et seq.*), construing the instrument as a completed contract and rendering judgment for defendant in error, based its action on the following propositions:

(a). That the use of the words "have sold" and "have bought" showed the instrument to be an executed contract of sale.

(b). That the provision for written confirmation could not apply to such an executed contract.

(c). That the provision that "we agree to deliver documents on payment if cable advice from our Home Office permits sale" and the subsequent sentence, "Reply will be received approximate seven (7) days when written confirmation will be made," applied only to the delivery of documents and not to the sale itself, and that the contract was severable in this regard.

(d). That the taking of the deposit showed the instrument to have been a completed contract and not an offer.

(e). That the denial that the instrument was a contract, contained in paragraph 2 of the answer, was nullified by the subsequent averment in paragraph 6 thereof that "if any contract existed between the parties, the same has been cancelled."

(f). That the use of the word "contract" in the original instrument and in plaintiff in error's letter of February 14, 1922, was an admission that the instrument was a contract.

(g). That the offer of plaintiff in error to sell defendant in error 50 tons of plate cuttings estopped plaintiff in error from denying the existence of a contract between the parties.

(h). That the facts that plaintiff in error did not offer to produce any cable directing suit to be brought

against the original buyers, that no such suit was brought and that the goods were sold to other persons, showed a breach of contract by plaintiff in error.

We believe we can demonstrate that the Court was in error on each and all of these propositions. In construing the alleged contract and its many provisions, the Court emphasized those provisions which, standing alone, might entitle the defendant in error to judgment, and disregarded or minimized the provisions on which plaintiff in error relied, ignored the connection between the several provisions of the instrument, and, when no better argument offered, declared the instrument to be a severable contract. In order properly to construe the instrument, all of its provisions should have been examined, its inconsistencies reconciled, if possible, and, if they could not be reconciled, those terms which indicate most clearly the intention of the parties should have been given the greater weight.

The Use of the Words "Have Bought" and "Have Sold" Has No Controlling Effect.

The lower Court laid undue stress on the words "have sold" and "have bought" in the opening sentence of the instrument, utterly disregarding the qualifying phrases immediately following. This sentence reads as follows:

> "Getz Bros. & Co. of the Orient, Ltd., *have sold* and Merchandise Brokerage *have bought* the

following described merchandise, *upon the terms and conditions as named herein and on the reverse side of this contract.*" (Italics ours.)

Construing this sentence, the Court said (Tr., pp. 50-51):

> "Now it is nowhere 'provided in said document' that the same—i. e., 'the contract of sale'—be 'confirmed by defendant's home office.' On the contrary, the document recites the sale as already effected. 'Getz Bros. & Co. *have sold* and Merchandise Brokerage *have bought,*' etc. Surely such a transaction needs no confirmation. The document recites an executed contract of sale, not an offer to sell." (Italics by the Court.)

The Court here overlooked the well recognized fact that, while the words "bought" and "sold" in their primary sense import an executed contract, they are commonly used in executory agreements, and, where qualified by other words or phrases, are construed in the light of the qualifying language used. Such is the rule in California, in the United States Supreme Court, and in many other jurisdictions. In *Walti* v. *Gaba,* 160 Cal. 324, the Supreme Court of California said (p. 327):

> "It is true that the writing states that 'I have this day sold,' etc., but the use of the word sold or the word bought does not always import a present sale, but such words are frequently used where the parties in fact intend only an agreement to sell."

Citing:

Blackwood v. *Cutting Packing Co.*, 76 Cal. 218;
McLaughlin v. *Piatti*, 27 Id. 458;
Elgee Cotton Cases, 22 Wall. 180, 22 L. Ed. 863.

> "It is conceded, *as of course it must be*, that the word 'sold' does not conclusively show a present conveyance." (Italics ours.)

Estate of Goetz, 13 Cal. App. 198, 201.

In the *Elgee Cotton Cases, supra*, the Supreme Court of the United States construed a contract reciting that the vendor had "sold" as an executory contract, and held that no title passed thereunder because it appeared that, under the contract, the goods had first to be weighed in order to ascertain the total price thereof and then to be delivered by the vendor.

The case of *Peatland Realty Co.* v. *Edwards*, 23 Cal. App. 402, involved a contract for the sale of a jack, which provided that "first party has sold . . . a Blue Jack . . . upon the following conditions." The Court there said (23 Cal. App. 405):

> "While it is true, as contended by appellant, that the word 'sold' primarily means a consummated sale, *such meaning is controlled by the context, which here clearly indicates an executory agreement not intended to transfer title save and except upon the performance of the conditions specified.*"

It was there held that, inasmuch as the jack did not fulfill the conditions upon which the sale was to be made, no title passed, and plaintiff could not recover.

In the instant case, the Court paid no attention to the fact that the instrument provided that plaintiff in error had sold *"upon the terms and conditions as named herein and on the reverse side of this contract."* One of these *"terms and conditions"* was that

> "We agree to deliver documents, on payment, *if cable advice from our Home Office permits sale to be made without suit against original buyers.* Reply should be receive(d) approximate(ly) seven (7) days *when written confirmation will be made."*

If the instrument had provided that "Getz Bros. & Co. of the Orient, Ltd., have sold the following described merchandise, if the Home Office permits the sale to be made without suit against the original buyers, in which case this transaction will be confirmed in writing," it would be merely another way of stating what was in fact the expressed intention of Mr. Parkhurst, the manager of the Shanghai office, when he executed the instrument in question. In neither case would the Court be justified in holding (Opinion, Tr., pp. 50-51) that "the document recites the sale as already effected. . . . The document recites an executed contract of sale, not an *offer* to sell." (Italics by the Court.)

The Court in its opinion (Tr., p. 51) adverted to the fact that

> "another portion of the document declares that 'written confirmation *will* be made' (not that it must be); but the context indicates that it applies to something else than the contract of sale, and if it were intended to apply to the latter it could have no effect upon a contract already executed." (Italics by the Court.)

This is begging the question. Under the authorities above quoted, the question whether there was an executed contract is to be determined from the instrument as a whole, not from a blind insistence that the use of the words "bought" and "sold" is conclusive. The reason why the clauses as to the Home Office permitting the sale and as to confirmataion appear as they do in another part of the instrument has been fully discussed and explained above, and the written or typewritten provision as to "confirmation" controls the printed words "bought" and "sold"[1]; but even were the instrument not a printed and written instrument, these clauses are none the less "terms and conditions" within the clear import of the first sentence of the instrument.

---

[1] "Where, as in the use of printed forms, a contract is partly printed and partly written, and there is a conflict between the printing and the writing, the writing will prevail. Handwriting will, under the same rule, prevail over typewriting, and typewriting over printing."

13 *C. J.* 536-7, and notes 87, 88, 89.

Where An Instrument Calls for Subsequent Confirmation There Is No Meeting of the Minds and No Contract.

By providing that the documents would be delivered, if the home office of the company permitted the sale, "when written confirmation will be made," Mr. Parkhurst advised the intending purchaser of the fact that he doubted his authority to sell, in view of the pending claims against the original buyers, who had rejected the goods "on the plea that the cargo was not up to specifications," as Mr. Shirek testified (Tr., p. 20). Until such written confirmation should be given, Mr. Parkhurst clearly intended that there should be no sale.

It is apparent, therefore, that the instrument is lacking in a vital element essential to the formation of a contract, namely, *the present, unconditional acceptance of the offer* of the purchaser to buy the goods. The rule, which is universally recognized, has been variously stated in the texts. It is said that the assent necessary to constitute a valid contract must be

> "mutual and intended to bind both sides. *It must also co-exist at the same moment of time.* A mere proposal by one man obviously constitutes no bargain of itself. It must be accepted by another and *the acceptance must be unconditional.*"
>
> 1 *Mechem on Sales,* Sec. 219, quoting *Benjamin on Sales,* Sec. 38.

> "An acceptance, to be effectual, must be identical with the offer and *unconditional.* Where a

person offers to do a definite thing, and *another accepts conditionally* or introduces a new term into the acceptance, *his answer is* either *a mere expression of a willingness to treat* or it is a counter proposal, and in neither case is there an agreement."

13 *C. J.* 281.

The case at bar is exactly analogous to those cases where contracts entered into by agents or salesmen contain provisions for their approval by the home office of the company on whose behalf they are executed. In such case it has been uniformly held that the so-called contracts are not binding on either party until such approval is given and communicated to the other party.

In the case of *Holder* v. *Altman,* 169 U. S. 81, 42 L. Ed. 669, the Supreme Court of the United States had under consideration a contract between Holder, a resident of Michigan, and Altman, Miller & Co., an Ohio corporation, which had not complied with the laws of Michigan relating to foreign corporations. Under the Michigan law, all contracts made in Michigan by such foreign corporations were void. The contract in question contained the following provision: "This contract not valid unless countersigned by our manager at Lansing, Michigan, and approved at Akron, Ohio." The Supreme Court held that the contract, which had been signed by the company's agent in Laingsburgh, Michigan, and countersigned

by its manager at Lansing, Michigan, was not made in that State, but in Ohio, where the final approval was endorsed thereon, and said (169 U. S. 91):

> "The approval at the plaintiff's home office was not a ratification by the plaintiff of an unauthorized act of one of its agents, for each of the agents . . appears to have acted within the strict limits of his authority. But the final approval by the plaintiff itself was an act which, according to the express stipulation of the parties, and in the contemplation of every person who affixed his signature to the paper, was a necessary step to complete the execution of the instrument by the plantiff, and to make it a valid and binding contract between the parties."

So, in the instant case, "written confirmation" was a necessary step to make a valid and binding contract between the parties.

The case of *Waco Mill & Elevator Co.* v. *Allis-Chalmers Co.,* 49 Tex. Civ. App. 426, 109 S. W. 224, involved an alleged contract signed by the agent of Allis-Chalmers Company, containing the following provision: "This proposal is for immediate acceptance of the purchaser, and is subject to the written approval of the executive officer or general manager of sales of the company, and shall not be binding upon the company until so approved." No such approval was ever given, and the Court, in holding that there was no contract, said (109 S. W. 227):

> "A contract with this provision in it means that it is merely a proposal, subject to approval, and

> would only become binding upon the defendant when so approved. . . . If it be conceded that Everett had the authority to execute the instrument in question, it was not a binding contract until approved by the defendant, which the Court below finds was not the case."

In *Perkins* v. *Maurepas Milling Co.,* 88 Miss. 804; 40 So. 993, the instrument sued on recited that "This contract order is taken subject to approval of Grand Rapids Gas Engine & Yacht Co." In holding the complaint *fatally defective on demurrer,* for want of an allegation that such approval had been given, the Court said (40 So. 994):

> "The consummation of the contract was dependent on an affirmative ratification by the appellant. . . . No right of any kind could possibly have accrued to appellee under the order here under review until it had reached the appellant and had received his approval. . . . It required the acceptance of the appellant to vitalize the order into a definite and enforceable contract."

To the same effect are the following cases:

Hart-Parr Co. v. *Brockriede,* 188 Pac. (Okl.) 113;

Whitman Agricultural Co. v. *Hornbrook,* 24 Ind. App. 255, 55 N. E. 502;

Huber Mfg. Co. v. *Wagner,* 167 Ind. 98, 78 N. E. 329;

Barnes Cycle Co. v. *Schofield,* 111 Ga. 880, 36 S. E. 965;

J. C. Lysle Milling Co. v. *Rumph & Tyson,* 203 S. W. (Ark.) 850.

It may be noted in passing that in the Lysle case, last cited, the instrument recited that "these goods are *sold* at price, on terms and time of shipment specified above," yet the Court unhesitatingly held that there was no contract of sale, because there was no approval of the order, which provided that it was subject to "*confirmation* by J. C. Lysle Milling Co. at their office in Leavenworth, Kan."

Where traveling salesmen or drummers take orders for their employers, it is always held that such orders, even though signed by the salesmen in the names of their principals, constitute mere offers to purchase on the part of the buyers, and that, until the orders are accepted by the sellers and such acceptance is communicated to the buyer, there is no contract and either party may withdraw.

> "An order for the purchase of goods, given by the purchaser and signed by the seller's agent, which, by its terms, is subject to the acceptance and approval of the seller, is not a contract and if the seller does not accept such order, he incurs no liability thereon. Such order may be revoked by A at any time before B accepts it. A so-called contract which is entered into between A and B's agent X, which by its terms is not binding upon B until accepted by him, is in the meantime a mere offer on the part of A."
>
> 1 *Page on Contracts* (2d Ed.), pp. 292-3, and cases cited.

And the rule quoted applies to drummers generally, even though there is no express reservation of the right of approval by the principal, because of the universal recognition of the fact that their authority is limited to the taking of orders.

Baird v. *Pratt,* 148 Fed. 825;
Gould v. *Cates Chair Co.,* 147 Ala. 629, 41 So. 675;
L. A. Becker Co. v. *Alvey,* 27 Ky. L. Rep. 832, 86 S. W. 974;
Reid v. *Northwestern Implement & Wagon Co.,* 79 Minn. 369, 82 N. W. 672.

In the instant case, Mr. Parkhurst placed himself in the traveling salesman or drummer class by advising defendant in error, in the so-called contract, that he would have to find out from his home office whether or not the sale would be permitted, in which event "written confirmation" would be made. In the language of *Perkins* v. *Maurepas Milling Co., supra,* it required such written confirmation "to vitalize the order into a definite and enforceable contract."

In the case at bar, the lower Court reversed its own previous ruling in the case of *Hsieh Po-Hsiang* v. *Shipper's Commercial Corporation,* 1 Extraterritorial Cases 1010, which involved a series of instruments, claimed to be contracts, each of which contained the following provision:

"We hereby confirm transaction consummated

> *with you today covering your purchase* of the following, *subject* to the conditions stated on the back hereof and *acceptance at Seattle office.*"

The lower Court, in holding that the petition was fatally defective on demurrer, for failure to allege such acceptance, said (1 Extraterritorial Cases 1011):

> "The instruments of November 19 purport to be nothing more than 'confirmations'—i. e., acceptances of offers previously made—and in order that a contract may result, *the acceptance must be unconditional.*
>
> As each of these instruments was *'subject to . . . acceptance at Seattle office,'* it would seem to follow that *no agreement could result at least until such acceptance was obtained.*" (Italics ours.)

"We hereby *confirm* transaction *consummated* with you today," is almost as strong language as "Getz Bros. & Co. of the Orient, Ltd., *have sold,*" and, standing by itself, it could only be construed as a recital of a completed transaction, yet the Court found no difficulty in deciding, and correctly deciding, that it was qualified by the clause "subject to acceptance." When this case was called to the attention of the Court on the argument of the demurrer in the case at bar, the Court held that the clause "if cable advice from home office permits sale . . . when written confirmation will be made" applied only to the delivery of the documents (Order Overruling Demurrer, Tr., pp. 12-14), and in its opinion and judgment, the Court elaborated on this view and said that

the instrument was a severable contract, a somewhat startling proposition which will now be discussed.

The Instrument Was Not a Severable Contract.

The opinion of the Court on this point reads as follows (Tr., pp. 52-4):

> "While only a part of it is pleaded and relied upon in the answer, counsel's main reliance in argument is upon the following provision of the instrument sued on:
>
> 'We agree to deliver documents on payment, if cable advice from our home office permits sale without suit against original buyers. Reply should be receive approximate seven (7) days when written confirmation will be made.'
>
> *It will be seen that this does not, in terms, qualify the provisions above discussed and which in the instrument are separated from it by considerable other matter.* The clause in question does not, in other words, provide, or even hint, that the sale and delivery of, or payment for, the goods are conditioned upon the receipt of 'cable advice from our home office.' On the contrary, 'payment' is assumed as something already fixed and upon it is conditioned the delivery, not of cargo—which had already been provided for absolutely—but of 'documents.' What these were we are left to conjecture, and no attempt was made to explain the ambiguity by evidence. If they were shipping papers they were clearly unnecessary, for delivering the goods for these, it is undisputed (p. 3), had been landed in Shanghai before the contract was signed.
>
> It is evident, then, that we are here considering an independent provision, separate and distinct from the portion which recites the sale as a *fait*

accompli and provides for 'complete delivery and full payment' respecting the goods. *The instrument before us, in other words, evidences not an entire but a severable contract—i. e., it contains not only a memorandum of sale requiring 'complete delivery and full payment,' but also a distinct provision regarding unidentified documents.* Now it is one of the characteristics of a severable contract that one portion of it may be enforced even though there can be no recovery as to another and distinct portion. At most such would be the result of accepting counsel's contention here. If it were true that the provision relied upon and last quoted has not been complied with, that would not prevent recovery for the breach of the separate and distinct agreement to deliver the goods which defendant had 'sold,' and plaintiff had 'bought.' " (Italics ours.)

In our discussion of the form of the instrument, we have shown why the terms therein quoted by the Court are "separated . . . by considerable other matter"; but, apart from that consideration, the reasoning of the lower Court on this point is absolutely unsound. We have examined all of the texts and cases cited (Tr., p. 53) by the Court in support of its construction of the contract as severable, and find none where it is held that a provision in a contract for the sale of a single lot of goods is severable from the provision for the delivery of documents evidencing the passing of title. The instrument itself shows that the plate cuttings in question were "covered by drafts Nos. B. C. 4139," etc., and it may well be that the cuttings had been sold to the original buyers upon

bills of lading or shipping documents, accompanied by drafts against the original buyers, and that these drafts and documents were still held by the bank or banks through which the drafts had been negotiated. In such case it would be perfectly natural that the documents should be "delivered on payment," if the sale went through. Be that as it may, it is absurd to say that the goods were sold, irrespective of the approval of the home office, but that the documents were only to be delivered "if advice from home office permits *sale*." Manifestly, both parties regarded the delivery of the documents, whatever they were, as a necessary concomitant of the sale of the goods and the passing of the title, yet the Court, in effect, held that the sale itself, the vital element of the transaction, required no confirmation, while the mere incident to the sale, the delivery of the documents, required "cable advice from the home office." In other words, the Court held that the home office, though it might not permit, could not prevent, the sale, though it could forbid the delivery of the documents. It might "forbid the banns," but not the marriage! The proposition requires no further discussion.

The Deposit of 900 Taels Did Not Make the Instrument An Enforceable Contract.

We would not deem it necessary to refer to this deposit had not the Court, in its opinion and judgment, said (Tr., pp. 50, 51):

> "The document recites an executed contract of sale, not an offer to sell. *Had it been a mere offer defendant would hardly have accepted, and plaintiff would hardly have paid, $900* (sic) *of the price.*"

The language of the instrument is "Receipt of *deposit* 900.00 Taels is hereby acknowledged," not "received payment of" or "received on account" 900.00 taels. There is nothing in this language to warrant the statement that this deposit was paid or accepted on account of the price, and under the rules of law above quoted there was nothing to prevent the defendant in error from drawing down this deposit at any time before written confirmation of the contract should have been made. When advising defendant in error that the sale would not be made, plaintiff in error returned this deposit by check, which was received by defendant in error and cashed (Tr., p. 24. Defendant's Exhibit No. 1, Tr., p. 43).

The Use of the Word "Contract" in the Original Instrument and in the Letter of February 14 Was of No Significance.

In its opinion (Tr., p. 51) the lower Court adverted to the fact that the first sentence of the instrument recites that plaintiff in error had sold the goods "upon the terms and conditions as made herein, and on the reverse side of *this contract,*" and also refers to the fact that

> "in its letter (Ex. D) of February 14, 1922, eleven days after the instrument was signed, defendant expresses 'regret that we cannot carry out *our contract* with you.' "

We have shown that this instrument was a mere tentative offer, on a printed form, but even were such not the case, it is common knowledge that the expression "contract" is frequently used to designate an instrument itself, as distinguished from the assent and meeting of the minds which creates the contractual relation. Thus, in the case of *Holder* v. *Altman, supra,* the instrument read, "This *contract* not valid unless countersigned," etc. *In Waco Mill & Elevator Co.* v. *Allis-Chalmers Co., supra,* the Court said, in the quotation cited on page 21 of this brief: "A *contract* with this provision in it means that it is merely a proposal." In *Perkins* v. *Maurepas Milling Co., supra,* the instrument read, "This *contract* order is taken subject to approval." Yet in each case the Court held that there could be no contract—that is to say, no *contractual relation*—until approval by the

principal. This double use of the term is recognized in the texts.

> "While the term 'contract' is sometimes used as meaning the writing by which the agreement is evidenced, the contract itself must not be confused with the instrument by which it is evidenced."
>
> 13 *C. J.* 239.

It is manifest that the word as used in the instrument in question was used as a description of the instrument itself, for the very first word at the head of the instrument is the word "CONTRACT" in capital letters (Tr., p. 3). And the quotation from the letter of February 14 (Plaintiff's Exhibit "D," Tr., pp. 42-3) is hardly fair to plaintiff in error, because the first sentence of that letter states that:

> "In compliance with our *memorandum* with you, we cabled to our home office on February 3d, as follows," etc.,

and, in closing the letter, the writer said,

> "Thanking you for the *offer,* we beg to remain," etc.

When in the same letter the instrument was variously described as a "memorandum," a "contract" and an offer," how can it be said that a binding contract, in the strict legal sense, was admitted by the mere use of the word "contract," when the letter as a whole is a rejection of the offer of defendant in error?

The Answer Sufficiently Denies the Existence of a Contract and Contains No Admission Thereof.

Paragraph 2 of the answer is as follows (Tr., p. 16):

> "2. Answering paragraph two of said petition, defendant admits executing the document therein mentioned, a copy of which is attached to said petition, but denies that the same constituted a contract of sale between the parties hereto, by reason of the fact that the same was not confirmed by defendant's home office as provided for in said document."

Paragraph 6 of the answer is as follows (Tr., p. 16):

> "6. Further answering said petition, and by way of a further and separate defense, defendant alleges that if any contract existed between the parties hereto, as alleged by plaintiff in this petition, that the same has been cancelled by mutual consent of the parties hereto."

The trial Court in its opinion (Tr., pp. 50-51), after quoting paragraph 2 of the answer and discussing the effect of the words "have bought" and "have sold" in language already quoted in this brief, goes on to say (Tr., p. 51):

> "It is true that another portion of the document declares that 'written confirmation will be made' (not that it must be); but the context indicates that it applies to something else than the contract of sale, and if it were intended to apply to the latter it could have no effect upon a contract already

executed. Since no other reason is alleged for impugning the contract, we must regard this denial in paragraph 2 as insufficient."

(We have already discussed the reasoning of the first sentence just quoted. The defendant, having been compelled to answer, could not deny the *execution* of the instrument, but had of necessity to deny the *legal effect* thereof, as it did in appropriate language in paragraph 2 above quoted.)

Continuing, the Court said (Tr., p. 51):

"That counsel himself so regarded it, seems indicated by the subsequent averment, 'if any contract existed between the parties hereto, as alleged by plaintiff in this petition, that the same has been cancelled by mutual consent of the parties' (paragraph 6).

Not only is no proof of cancellation offered, but the averment itself seems a qualified admission that there was a contract, and, therefore, nullifies the denial."

In support of the statement last quoted, the Court cites the cases of *Veasey* v. *Humphreys,* 27 Or. 515, 41 Pac. 8, and *Derby* v. *Gallup,* 5 Minn. 119, neither of which is in point or supports the conclusion of the Court. In the first place, the matter in paragraph 6 of the answer is set forth as a "further and separate defense"; and, in the second place, the conditional phrase "if any contract existed" is at most a qualified admission of a conclusion of law, not of the existence of a fact.

The case of *Veasey* v. *Humphreys, supra,* merely held that a defendant in an action for conversion could not deny the execution of a chattel mortgage in one defense, and admit it in a defense of confession and avoidance, and, in that case, in discussing the pleading of inconsistent defenses, the Court expressly recognized that it is good pleading at common law, in an action against a discharged bankrupt, for instance, for him to deny the execution of a contract in one defense and to plead his discharge in bankruptcy in another, in substantially the following form, "after the making of the said supposed contracts, he became a bankrupt," etc. Such inconsistent defenses the Court held not to constitute admissions of the matter denied.

In the case of *Derby* v. *Gallup,* 5 Minn. 119, it was held that, in an action for conversion of goods, a defendant could not deny a taking in one defense and admit it in a plea of confession and avoidance, *under the code of Minnesota,* although under the common law such pleading was sometimes permitted.

The Offer of Plaintiff in Error to Sell 50 Tons of Cuttings Was a New Offer and Not a Recognition of the So-called Contract.

On February 20, 1922, plaintiff in error addressed to the attorney for defendant in error the following letter (Plaintiff's Exhibit "A," Tr., pp. 39-40):

"Head office
San Francisco, U. S. A.
Getz Bros. & Co. of the Orient, Ltd.
Incorporated
Exporters and Importers
Whiteaway, Laidlaw Bldg.,
Nanking Road Cor. Szechuen.
Shanghai, China, February 20th, 1922.

Mr. F. J. Schuhl,
112 Szechuen Road,
Shanghai.

Dear Sir:

Re: Merchandise Brokerage Co.

We acknowledge your favor of February 16th, 1922, and beg to advise that we have been holding for the above (plaintiff) approximately *fifty (50) tons of Plate Cuttings* that were shipped for our stock.

If they care to avail themselves of this material, it would be necessary for them to take up the cargo by Wednesday by 11 o'clock, otherwise we will consider that they will not accept *this offer.*

Yours truly,
Getz Bros. & Co. of the Orient, Ltd.,
By T. L. Parkhurst,
TLP—RA Manager."
(Italics ours.)

The lower Court, referring to this letter, says (Tr., p. 52):

> "It is undisputed that this lot was a part of the original cargo forming the subject matter of the sale which defendant not only does not question, but appears to recognize in this letter. Surely it would seem to be estopped from denying that there was a contract. Clearly, also, authorities are not in point which construe mere conditional offers."

We fail to find in the letter quoted any language which "recognizes" the sale, or makes any reference thereto. It mentions a different amount of goods, 50 tons as against 370 tons, to be taken "by Wednesday," which was February 22d, whereas the original instrument called for delivery and payment "on or before February 28th" (Tr., p. 3). We deem it unnecessary to discuss the elementary proposition that such a proposal, differing so vitally from the original proposition which had already been rejected, is a mere counter offer, and neither created nor recognized a sale on any terms. Authorities on this point could be cited *ad libitum*. We note the following:

13 *C. J.* 281, 282;
6 *R. C. L.* 608;
1 *Page on Contracts* (2d ed.), Sec. 137;
1 *Elliott on Contracts,* Sec. 38;
1 *Williston on Contracts,* Sec. 77.

The Reasons for the Rejection of the Offer and the Subsequent Dispostion of the Goods Are Matters Wholly Immaterial to the Case.

The Court, in closing its opinion, laid considerable stress upon the fact that no cable advice forbidding the sale was produced at the trial, that no suit was brought against the original purchaser, and that the goods were subsequently sold to others. We concede these facts, but respectfully submit that they are wholly immaterial. We have shown that no contract was entered into, because there was no "written confirmation" of the proposal contained in the instrument. It may be that the Court below felt that the real reason for the failure of plaintiff in error to consummate the transaction was a rise in the price of the goods, but that fact, if it was a fact, did not authorize the Court to make a contract for the parties where none was shown to have been made. In the case of *Gould* v. *Cates Chair Co.,* 147 Ala. 629, 41 So. 675, which involved an order taken by a salesman and rejected by his principal, when it was suggested that the reason for the rejection was a rise in price of the goods, the Court said (41 So. 677):

> "Having the right to decline acceptance of the order, it would be a matter of no importance upon what ground the declination was placed or whether any ground was stated."

In the case of *Kleinhans* v. *Jones,* 68 Fed. 742, it was held that the reason for the rejection of an offer was immaterial. The Circuit Court of Appeals for the Sixth Circuit, Judges Taft, Lurton and Severens presiding, there said through Judge Severens (68 Fed. 748-9):

> "While it may be—and we think it quite probable that such would have been the result—that Jones would not have objected to the variations from the first offer contained in the second, which was accepted by Pope, but for the intervention of other parties, and the prospect of obtaining a larger purchase price by disavowing the act of Pope, yet we are not at liberty to act upon any conjecture as to whether Jones would have ratified Pope's act, whether or not the new parties had come into the field. In the first place, a court of equity has no power to enforce the specific performance of a contract which is not already established between the parties; and *in order to give ground for the action of the Court, it must be made clearly to appear that a definite and binding legal contract exists.*"
>
> (Italics ours.)

Having made no contract, plaintiff in error was at liberty to sue, or to refrain from suing, the original purchasers, and to sell the goods to any person for any price it chose to accept, and these matters, being all *res inter alios acta,* and occurring after the rejection of the proposed sale, had no evidentiary value and created no estoppel.

For the reasons above stated, we respectfully submit

that the judgment of the lower Court should be reversed.

CHARLES W. SLACK and
EDGAR T. ZOOK,
Attorneys for Plaintiff in Error.